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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition is to review the Seventh Circuit's decision that a bankruptcy order confirming a plan of reorganization, in which the value of tort claims was estimated, is binding on an insurer/non-creditor. Under the Bankruptcy Code, the bankruptcy court can estimate the value of such claims to determine if reorganization is feasible, but cannot liquidate them. The pre-petition, state-law insurance coverage action between the debtor and petitioner was withdrawn by the district court since no party consented to bankruptcy jurisdiction. In the reorganization plan, the debtor reserved the right to litigate with and retain any recovery from the insurers as a condition precedent to confirmation of the plan. The following questions are presented.

1. If the confirmation order is held to be binding where the insurance dispute was withdrawn to the district court and there was no consent to bankruptcy jurisdiction, does such a holding violate Article III?

2. Does the Bankruptcy Code permit a bankruptcy court to issue final, binding decisions affecting the liability of non-creditor for a debt owed by the debtor?

3. Was the notice given to the non-creditor adequate for preclusion principles as required by the due process clause where the plan provided that the insurance action would be retained by the newly-reorganized debtor?

4. Whether preclusion principles apply where the parties to the bankruptcy proceedings agreed on a formula by which the value of the tort claims was estimated and the bankruptcy court considered that estimate in confirming the plan of reorganization?

5. Whether there is a present case or controversy where state law requires a case-by-case showing that a claim is covered by an insurance policy and no claim has been identified, nor has any judgment been entered nor settlement been reached which is binding on the insurer?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Continental Casualty Company[1] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 29, 1991 and denial of rehearing on October 3, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *UNR Indus., Inc. v. Continental Casualty Co.*, 942 F.2d 1101 (7th Cir. 1991) and is reprinted in the separate appendix, p. 1a. Its denial of the petition for rehearing is reprinted in the appendix, p. 18a.

[1] Petitioner's Rule 29.1 statement provided in its application for extension of time is current.

The memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division reviewed by the Seventh Circuit was not reported. It is reprinted in the appendix, p. 19a. The judgment entered by the district court on April 30, 1990 is reprinted in the appendix, p. 26a. The amended judgment entered on May 21, 1990 is reprinted in the appendix, p. 29a.

Related memorandum decisions of the district court in *UNR Indus., Inc. v. Continental Ins. Co.* were reported at: 682 F.Supp. 1434 (N.D. Ill. 1988) ("Phase I"); 623 F.Supp. 1319 (N.D. Ill. 1985); 607 F.Supp. 855 (N.D. Ill. 1984); and 101 B.R. 524 (N.D. Ill. 1989). Other decisions were not reported and are reprinted in the appendix. The decision entered on November 8, 1988 ("Phase II") is at p. 33a. The January 10, 1989 order is reprinted at p. 65a. Decisions in the bankruptcy proceedings, *In re UNR Indus., Inc.*, were reported at 74 B.R. 146 (Bkrtcy N.D. Ill. 1987) and 45 B.R. 322 (Bkrtcy N.D. Ill. 1984). The bankruptcy court's order confirming the reorganization plan entered June 30, 1990 was not reported and is reprinted in the appendix, p. 74a.

STATEMENT OF JURISDICTION

The Seventh Circuit decided this case on August 29, 1991 (App. 1a). The petition for rehearing and suggestions for rehearing en banc was denied on October 3, 1991 (App. 18a). Petitioner's application for an extension of time until February 12, 1992 was granted by this Court's order of December 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTORY AND OTHER AUTHORITIES

Sections 1 and 2 of Article III of the U.S. Constitution are reprinted in the appendix, p. 98a. The Fifth Amendment is reprinted in the appendix, p. 98a. Pertinent sections 28 U.S.C. §1334 are reprinted in the appendix, p. 98a. Pertinent sections of 28 U.S.C. §157 are reprinted at p. 99a. Pertinent sections of 11 U.S.C. §1123 and §524(e) are reprinted in the appendix, pp. 100-01a. Bankruptcy Rule 7012(b) is reprinted in part in the appendix, p. 101a.

STATEMENT UNDER RULE 29.4(B)

Since this petition draws into question the constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable. No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

UNR Industries, Inc. is the successor of various companies (collectively "UNR") which, from 1918 until April 1970, manufactured asbestos-containing products (App. 78a). When asbestos fibers are inhaled, they may cause certain diseases which do not usually manifest until many years after exposure (App. 78a). In 1962, UNR discontinued the production of "substantially all of its asbestos products" when it sold its major product line (App. 78a). Minor amounts of UNR asbestos products were sold through the 1960's and discontinued on April 1, 1970, when its last plant and all inventory were sold (App. 20a, 72a, 78a).

UNR's Insurance Coverage, Asbestos Claims and Houston Agreements

UNR purchased primary, comprehensive general liability insurance from various insurers. Starting November 1, 1970 until 1981, it purchased primary insurance from Continental Insurance Company ("Continental" or "the primary insurer"), with annual policy limits of $500,000. Per occurrence deductibles were later added (App. 20a, Doc. 2055 (UNR Memo.) Exh. 3).[2]

UNR bought one excess policy from petitioner CNA which indemnified UNR for loss in excess of the limits of Continental's

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[2] Continental Insurance Company ("Continental") is not related to Continental Casualty Company, which is referred to herein as "CNA" (Doc. 1449 p.1).

primary insurance.[3] It was in effect for the first three years of Continental's policy, and eight years after UNR was virtually out of the asbestos business and seven months after the last product line and all inventory was sold (App. 20a, 78a, Doc. 2055 (UNR SJ Memo.) Exh. 3).

Beginning in the late 1960's, UNR and other asbestos manufacturers were sued by workers who claimed to be injured by exposure to asbestos (App. 71a, 79a). Through 1975, two years after CNA's policy period expired, only 97 suits had been filed against UNR. After 1975, the number of claims doubled or tripled from year to year (App. 71a).

UNR believed that it was uninsured until 1958. *UNR Indus., Inc. v. Continental Ins. Co.*, 682 F.Supp. 1434, 1440 (N.D. Ill. 1988). When UNR was first sued by asbestos claimants, it submitted the claims to its primary insurers. As the number of asbestos suits increased, UNR's attorney recommended that UNR avoid coverage litigation with its primary insurers because of the extended period it was uninsured. In 1976, UNR entered into an agreement with each of its primary insurers, referred to as the "Houston Agreements" ("Agreements"). CNA and the other excess insurers were never parties to the Agreements, and objected because they required an improper, arbitrary allocation of claims among UNR and the primary insurers (Sup.Rec.Vol.

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[3] "Loss" was defined as "sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages and other insurances (whether recoverable or not) (Doc. 2050 (UNR SJ Mot.) Exh. 1, p. 4).

The conditions required UNR to give CNA notice of any claim. UNR agreed to cooperate with and assist CNA in settlements, and also agreed that it "shall not, except at [its] own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident."

The conditions also contained a "no action" clause, which precluded actions against CNA if either of two criteria were not met. First, UNR had to fully comply with all the policy terms and, second, "the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured or by written agreement of the insured [UNR], the claimant and the company [CNA]" (Doc. 2050 (UNR SJ Mot.) Exh. 1 p. 5 ¶¶6,7).

14 #69 Tabs 71, 83).[4] *UNR*, 682 F.Supp. at 1444-45, 1450-51. UNR was aware at the time that the Agreements created problems with its excess policies. *Id.* at 1450-51. The Agreements provided that if a plaintiff claimed to be exposed to UNR products during a year when a primary insurer's policy was in effect, that insurer would contribute a fixed percentage of the costs, regardless of what the ultimate evidence established (Sup.Rec.Vol. 14 #69 Tab 71 p. 3). *Id.* at 1441.

As claims were asserted against UNR, they were paid according to the Agreements.[5] UNR never claimed that its primary insurance below CNA's excess policy was exhausted. As UNR explained to CNA in 1978, "no claim has resulted in an obligation by Continental" in excess of the per occurrence deductible, with the result that other insurers and UNR paid all the claims under the Agreements (Sup.Rec.Vol. 14 #69 Tab 71 p. 3).

Insurance Disputes Commence in State Court and UNR's Reorganization

UNR cancelled the Agreements in December 1981 (App. 39a). CNA and other insurers filed a declaratory judgment action on the coverage issues in state court (App. 79a). UNR subsequently filed a chapter 11 petition in the bankruptcy court, and the state actions were stayed (App. 79a). UNR and some of its insurers filed adversary complaints in the bankruptcy court. *UNR*, 682 F.Supp. at 1438. CNA did not file an adversary claim or counterclaim, but was named as a defendant by UNR in its adversary complaint. Neither UNR nor the insurers consented to the bankruptcy court's jurisdiction. *UNR Indus., Inc. v. Continental Ins. Co.*, 623 F.Supp. 1319, 1333 n. 9 (N.D. Ill. 1985). The insurance disputes were withdrawn by the district court in 1983 (Dkt. 356). *UNR Indus., Inc. v. Continental Ins. Co.*, 607

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[4] On appeal to the Seventh Circuit, the parties filed a supplemental record by agreement, cited to herein as "Sup. Rec."

[5] The terms of the Agreements were established by a jury. For claims asserted before 12/31/75, Continental was to contribute 15%. For those asserted in 1976, it was to contribute 50%, subject to a $15,000/year deductible and, from 1977-79, it was obligated for 50% subject to a $30,000/year deductible. For claims asserted in 1980-81, Continental's portion was 40%, again subject to its deductibles. *UNR*, 682 F.2d at 1441.

F.Supp. 855, 858 (N.D. Ill. 1984). The district court found that the insurance disputes between the debtor/insured and non-creditors/insurers were "related," not "core" proceedings. *UNR*, 623 F.Supp. at 1332.

The district court ordered that the case be tried in phases. In Phase I, the jury found that the Houston Agreements between UNR and its primary insurers were binding and enforceable. It also determined the terms of the Agreements (*supra*, p. 5 n. 5). The district court entered a declaratory judgment applying the jury's findings. 682 F.Supp. at 1461-63.

A second declaratory judgment decided the effect of the Agreements on the excess policies ("Phase II") (App. 33-70a). The court held that although UNR had terminated the Agreements, the primary insurers' policies, which were in effect before the Agreements, were still binding (App. 39a). Therefore, Continental, the primary insurer below CNA, had to pay its unexhausted policy limits to indemnify for claims which occurred during CNA's three-year policy period (App. 40-42a). Under Illinois law, as established in *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill.2d 23, 514 N.E.2d 150, 161 (1987), a claim occurs during a policy period if there is actual exposure to an insured's product or manifestation of a sickness or disease as shown on a case-by-case basis, or a "double trigger" for coverage (App. 53a).

Applying *Zurich*, the district court held that coverage is not triggered during periods after exposure ends, but before sickness or disease, i.e., "exposure in residence" (App. 53a). If a primary insurer made payments under the Agreements "solely on the basis of liability for injury during the period between exposure and manifestation," those payments could not apply toward exhaustion of the primary coverage (App. 53a). Continental still had unpaid primary insurance limits available to satisfy claims which occurred during CNA's policy period (App. 42a, 48a). After Phase II, UNR settled with its insurers, except CNA. *UNR Indus., Inc. v. Continental Ins. Co.*, 101 B.R. 524, 525 (N.D.Ill. 1989).

Plan of Reorganization and Claims Facility Procedures

In the bankruptcy court, UNR submitted a disclosure statement and a proposed plan of reorganization, the terms of which it had negotiated with the creditor committees (App. 77-97a). UNR explained that there were claimants who alleged injury due to asbestos exposure, but they had not been determined to be valid (App. 95a). UNR explained that it was "impossible to predict with any certainty the number, liquidated value or time of assertion" of the asbestos claims (App. 83a). However, a company had been retained to estimate the approximate value of the asbestos claims (App. 84a). After "intense and protracted negotiations" among UNR, creditor committees and attorneys, a formula was agreed upon to arrive at a dollar amount of the value of present and future asbestos claims (App. 85a). The debtor and creditor committees agreed on these terms of the proposed reorganization plan (App. 85a).

The plan proposed the transfer of a majority of the stock of the reorganized company into a trust which, in turn, would create a claims facility for determination of the validity of asbestos claims (App. 83a). Valuation of the claims was to "be based upon values established in the tort system considering all relevant factors" (App. 92a). The facility was to liquidate the claims. It could disallow invalid claims and, if valid, claims were to be paid by the trust (App. 84a, 95a).[6] After all claims were disallowed or allowed and paid, any remaining trust assets were to go to charitable purposes (App. 93a).

As a condition precedent to the plan's confirmation, the plan required that all insurance proceeds recovered would be assets of post-bankruptcy UNR ("new UNR"), which reserved

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[6] Each claimant had three options, all three of which required the claimant to demonstrate exposure to a UNR asbestos-containing product and to provide a medical report containing a diagnosis of an asbestos-related disease or injury (App. 92-93a, 95-97a). The third permitted a claimant to submit to alternative dispute resolution and, if not settled, file suit against the trust and have a jury trial to set the value of the claim (App. 96-97a). If tried, all defenses would be available to UNR (App. 97a). For example, UNR asserted an immunity defense for all claims based on products installed in ships for the government. *In re UNR Indus., Inc.*, 74 B.R. 146 (Bkrtcy N.D. Ill. 1987).

the right to continue to litigate the pending insurance disputes (App. 86-87a, 89-91a). The bankruptcy court approved the plan on June 1, 1989 (App. 74-76a).

Cross Motions for Summary Judgment

CNA moved for summary judgment on the basis of the district court's prior declaratory judgments. One basis of the motion was that UNR, to date, had not identified any covered claims (i.e., in which there had been exposure and/or manifestation during CNA's policy period), which exhausted the primary coverage and triggered CNA's excess policy (Doc. 2048 (CNA SJ Mot.); Doc. 2079 (Affid.) pp. 2-3). A case-by-case examination of UNR's existing files by CNA did not establish exhaustion of UNR's primary insurance (Doc. 2079 (Affid.)).

UNR filed two motions for summary judgment. It sought a declaration that its transfer of stock to the trust which would determine the validity of the asbestos claims represented "a legal obligation imposed on UNR that triggers defendants' obligations to reimburse UNR" (Doc. 2050 (UNR SJ Mot.) pp. 4-5). It also sought a declaration regarding the burden of proof (Doc. 2049 (UNR SJ Mot.)). In opposition to CNA's motion, UNR relied on a statistical study which estimated the number and value of present and future tort claims. This study projected that all tort claims would exceed the total of all insurance policies (Doc. 2059 (UNR Reply Memo.) Exh. 2).

District Court Enters Summary Judgment

The district court granted CNA's motion for summary judgment and denied UNR's (App. 19-25a). It held that there was no present controversy before it because, under the unambiguous terms of CNA's policy, UNR had to establish exhaustion of the primary insurance by covered claims before CNA's excess obligations were triggered (App. 23a). UNR's settlement with Continental did not automatically exhaust the primary limits underlying CNA's policy because no claims had yet been identified by UNR (App. 22a). Because UNR had not identified any claims which reached CNA's excess policy, CNA had no present liability (App. 23a).

The district denied both of UNR's motions (App. 23-24a). The bankruptcy court's order of confirmation, approving the reorganization plan, was not a "judgment" within the meaning of the CNA policy (App. 24a). The documents filed by CNA with the court suggested that the claims falling within CNA's policy period would be satisfied out of UNR's primary coverage (App. 24- 25a). Therefore, the district court found no present basis for granting further declaratory relief (App. 25a).

Seventh Circuit Reverses

The Seventh Circuit reversed (App. 1-17a). It held that the insurance dispute was "related" to the bankruptcy, and the district court had jurisdiction under 28 U.S.C. §1334(b) (App. 2a).

It found that UNR sustained a loss because "UNR's bankruptcy resulted in a judgment or settlement (which one does not matter)" of the asbestos claims thus triggering CNA's obligations under its indemnification policy (App. 4-5a). It first stated that a settlement would not normally be binding on CNA because it was not a party to the bankruptcy proceedings (App. 6a). Here, however, CNA had notice of the bankruptcy proceeding, had not objected to the plan nor appealed the confirmation order (App. 6a). The Seventh Circuit found that the bankruptcy court's order confirming the reorganization plan, in which the value of the tort claims was estimated, was binding on CNA (App. 5a). "The order confirming that reorganization was final and appealable. And the order is binding. The parties may not relitigate the matter" (App. 5a). CNA had waived any rights under the policy provision which precluded an insured from settling without CNA's written consent (App. 6a).

The court agreed that CNA was not liable unless a claim was covered under the policy during CNA's policy period (App. 11a). It affirmed the district court's interpretation of the holding of the Illinois Supreme Court in *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill.2d 23, 514 N.E.2d 150 (1987) that Illinois recognized a double trigger for insurance coverage "in all respects" (App. 9a n. 9). It stated that the district court, in holding that the amount of claims had to be shown on a case-by-case basis under state law "may be right," but that the district court had "prejudged" this issue (App. 10a).

The Seventh Circuit then calculated the "real value" of the claims by applying the formula negotiated between the debtor and creditor committees. It calculated that estimated value of tort claims contained in the proposed plan was $254 million in "real value" (App. 6a).[7] The district court had to determine "how much of the $254 million value of all of the asbestos claims is allocable to each year of CNA's policy period" (App. 11a). It acknowledged that CNA was only responsible for the amount of this allocation which exceeded the primary limits in any year, subject to the policy limits (App. 11a).

REASONS FOR GRANTING THE WRIT

In recent years, some companies have faced either enormous verdicts or mass tort suits filed by hundreds or thousands of claimants. More and more frequently, these same companies have sought the protections afforded by the Bankruptcy Code. *See, e.g., Tringali v. Hathaway Mach. Co.*, 796 F.2d 553 (1st Cir. 1986); *A.H. Robins, Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) (production of the Dalkon Shield created an "avalanche of actions"); *In re Celotex Corp.*, 128 B.R. 478 (Bkrtcy M.D. Fla. 1991); *In re Johns-Manville Corp.*, 40 B.R. 219, 221 (S.D.N.Y. 1984) (asbestos manufacturer faced a "litigation explosion" of personal injury suits). *See also In re Raymark Indus., Inc.*, 99 B.R. 298 (E.D. Penn. 1989) (involuntary chapter 11 petition filed by asbestos claimants).

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[7] The disclosure statement explained that UNR retained an actuarial firm, Towers, Perrin, Forster & Crosby ("Towers") to study "the feasibility of estimating UNR's liability for asbestos-related claims." The Towers report "indicated that sufficient information existed to estimate a range of likely total claim costs for then existing as well as future asbestos-related claims" (Doc. 2050 (UNR Memo.) Exh. 1 (Discl. Stmt) p. 3). UNR and the creditor committees, which included the present and future asbestos claimants, as well as trade and other unsecured claimants, negotiated a formula to divide the stock according to the classes of creditors (App. 85a). About 63% of the stock would go to asbestos claimants, if the asbestos property claims were not allowed (App. 83a). Assuming that the value of the stock were $150 million, 63% would be $94.5 million that UNR would actually pay to settle the asbestos claimants, reduced by the share to go to the asbestos property claims (App. 85a). Since this insurance dispute was withdrawn from the bankruptcy court, this record does not show whether the asbestos property damage claims were ever allowed.

These tort suits also result in the filing of declaratory judgment actions against the insurers of the bankrupt companies. *See UNR Indus., Inc. v. Continental Ins. Co.*, 682 F.Supp. 1434, 1448-49 (N.D. Ill. 1988) (collecting cases).[8] The insurance policies which indemnify for tort liability can be "the most important asset" of those companies. *A.H. Robins*, 788 F.2d at 1001, *citing In re Johns-Manville Corp.*, 33 B.R. 254, 261 (Bkrtcy S.D.N.Y. 1983).

The issues in this case arise from the interaction of the debtor/insurer (or debtor/non-creditor) relationship, Article III, the Due Process Clause and the Bankruptcy Code. The Seventh Circuit held that the bankruptcy order confirming the reorganization plan was binding on the insurer. The plan estimated the value of present and future tort asbestos claims. However, the pre-petition insurance dispute was originally filed in state court. After the chapter 11 petition was filed, adversary claims over the insurance disputes were brought and withdrawn from the bankruptcy court by the district court. CNA was not a creditor nor had it filed an adversary proceeding or counterclaim in the bankruptcy court. It did not consent to the jurisdiction of the bankruptcy court.

The question presented is what effect does the estimation of the value of tort claims by a bankruptcy court in confirming a consensual plan of reorganization have on a pre-petition state law contract claim previously withdrawn to the district court? This Court should allow this Petition to determine this important question and resolve conflicts among the circuits.

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[8] In turn, there is an insurance crisis which has been attributed to the number of tort claims and size of verdicts. *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1532-39 (1987), *citing* U.S. Dep't of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordibility* (1986).

I. IS A FINDING THAT A BANKRUPTCY COURT'S ESTIMATION OF THE VALUE OF TORT CLAIMS IS BINDING CONTRARY TO THE BANKRUPTCY CODE AND UNCONSTITUTIONAL?

A. Can Any Preclusive Effect Be Given to a Bankruptcy Court Order Under Article III After the District Court Withdraws a Pre-Petition State Law Claim?

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), this Court held that the Bankruptcy Act of 1978 violated Article III because jurisdiction over all civil proceedings related to or arising in cases under title 11 was vested in non-Article III bankruptcy courts. Article III precluded Congress from vesting bankruptcy courts with the judicial power to issue binding and enforceable final judgments. *Id.* at 85-86. "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case." *Id.* at 71. The Court later reiterated its holding:

> Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under the state law, without consent of the litigants, and subject only to ordinary appellate review.

Thomas v. Union Carbide Agric. Prod. Co. 473 U.S. 568, 584 (1985).

After *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Act") in an attempt to cure this constitutional deficiency, segregating "core" and "non-core" proceedings for jurisdictional purposes. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143 n. 16 (6th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3267 (U.S. Sept. 13, 1991) (No. 91-497), *citing In re Wood*, 825 F.2d 90, 91-92 (5th Cir. 1987). Section 1334 of the 1984 Act provides that district courts have original but not exclusive jurisdiction of civil proceedings arising under, arising in or related to bankruptcy cases. 28 U.S.C.

§1334(b). Section 157 permits a district court to refer proceedings to the bankruptcy court and to withdraw them. 28 U.S.C.§§157(a) and (d).

Section 157(b)(2)(0) generally permits a bankruptcy court to conduct proceedings which affect the assets of the estate, but expressly exempts tort claims. 28 U.S.C. §157(b)(2)(0). The Code mandates that personal injury tort claims "shall be tried in the district court." 28 U.S.C. §157(b)(5). It also provides that a bankruptcy court may estimate claims or interests for the purpose of confirming a reorganization plan, "but not the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution." 28 U.S.C. §157(b)(2)(B).

In this case, after UNR filed for reorganization under chapter 11, the district court held that the pre-petition insurance disputes were not "core," but "non-core" or "related," proceedings. *UNR Indus., Inc. v. Continental Ins. Co.*, 623 F.Supp. 1319, 1332 (N.D.Ill. 1985). The Seventh Circuit concurred that they were "related" (App. 2a). The parties did not consent to the bankruptcy court's jurisdiction and the district court withdrew these actions. *Id.* at 1333 n. 9. In the reorganization proceeding, the debtor and creditor committees agreed to a plan of reorganization which estimated the value of present and future personal injury claims (App. 83-85a). The bankruptcy judge considered the estimated value for the purposes of confirming the plan, and entered a confirmation order (App. 74-76a).

The Seventh Circuit's decision that CNA, the debtor's insurer, was bound by the bankruptcy court's estimation of tort claims for the purpose of confirming the proposed reorganization plan conflicts with the Bankruptcy Code. It also raises a constitutional issue under Article III and this Court's holding in *Northern Pipeline*. The Seventh Circuit held that the order confirming the consensual plan was "final and appealable," and "binding" on CNA (App. 5a). If the constitutional deficiency in the 1978 Act was Congress' empowering bankruptcy courts to issue final judgments with respect to state-created private rights which are "binding and enforceable" (*Northern Pipeline*, 458 U.S. at 85-86), then the Seventh Circuit's decision interprets the Code in an unconstitutional manner.

This decision creates a split in the circuits on the question of whether a bankruptcy court's orders are binding on parties in a non-core action where the bankruptcy court lacked jurisdiction over that action. Here, the Seventh Circuit concluded that the insurer could be bound, notwithstanding the district court's withdrawal of the state-law action and §157 which precludes a bankruptcy court from estimating or liquidating tort claims for distribution. 28 U.S.C. §157(b)(2)(B).

The Fifth Circuit has come to an opposite result, holding there is no effect to a bankruptcy order where that court lacked jurisdiction. It held that "the preclusive effect of a bankruptcy decree must reflect the reality of its limited jurisdiction," and refused to accord any effect to a confirmation order because it would violate Article III, relying on *Northern Pipeline*. *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983-84 (5th Cir. 1990). *Accord Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 189 (5th Cir. 1990); *In re Marill Alarm Sys., Inc.*, 81 B.R. 119, 122 (S.D.Fla. 1987), *aff'd without op.*, 861 F.2d 725 (5th Cir. 1988) (bankruptcy court's final judgment invalid where it lacked jurisdiction under *Northern Pipeline* over state RICO claims). *See also In re Satelco, Inc.*, 58 B.R. 781, 789 (Bkrtcy N.D. Tex. 1986) (if §157 were read to permit a bankruptcy court to adjudicate state law claims, it would be "clearly unconstitutional").

In contrast to its decision here, the Seventh Circuit also has recognized that the findings of a bankruptcy court are not binding on non-core proceedings because the bankruptcy court lacks jurisdiction. In *Barnett v. Stern*, 909 F.2d 973, 979 (7th Cir. 1990), it held that a bankruptcy decree had no binding effect over a federal RICO action. In *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991), the reorganization plan provided that the tort claims would be adjudicated in other courts. The Seventh Circuit held that the bankruptcy court lacked jurisdiction under Article III and *Northern Pipeline* to adjudicate defenses to those suits.

While unquestionably, a confirmed plan of reorganization binds the debtor and creditors, research has not revealed any case, except the Seventh Circuit here, which held that a confirmation order binds a debtor's debtor, or potential indemnitor. Section 524(e) provides that the "discharge of a debt of the debtor

does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). Other courts have recognized that §524(e) prevents a bankruptcy court from entering orders which affect the liability of others for debts. *See Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) and *United States v. Stribling Flying Serv., Inc.*, 734 F.2d 221, 223 (5th Cir. 1984) (guarantor's liability on debt unaffected by bankruptcy confirmation order). *See also In re Northwest Exploration Co.*, 71 B.R. 873, 879 (Bkrtcy N.D. Okla. 1987) (Article III, *Northern Pipeline* and the Code, "undeniably prohibit a bankruptcy debtor from using the Bankruptcy Courts to modify pre-petition contractual relationship with his *debtor*") (original emphasis). This is one reason why the district court withdrew this state-law insurance dispute and retained jurisdiction in the first place. *UNR*, 623 F.Supp. at 1332-33 ("claims (whether state-law or not) by the debtor against a non-creditor" are not core proceedings and, absent consent, the bankruptcy court lacks jurisdiction).

Here, the district court withdrew the state law action between the debtor and its insurer/non-creditor. This Court should accept this petition to decide the important question of whether a bankruptcy court has the jurisdiction under the Bankruptcy Code and Article III to issue final and enforceable orders which are binding on a non-creditor under these circumstances?

B. Can Consent or Waiver Vest Jurisdiction in a Court Which Lacks Subject Matter Jurisdiction Under Article III?

If a matter is related to the bankruptcy and referred to the bankruptcy court, then the bankruptcy judge submits proposed findings of fact and conclusions of law to the district court for *de novo* review. 28 U.S.C. §157(c)(1). However, with the parties' consent, the bankruptcy court may enter final orders and judgments in a case which is related to the bankruptcy. 28 U.S.C. §157(c)(2); *Wolverine Radio*, 930 F.2d at 1143-44. Bankruptcy Rule 7012(b) requires "express consent."

The Seventh Circuit held that CNA's failure to object to or appeal from the confirmation order resulted in a binding determination and a waiver of any objections even though the plan provided that the insurance litigation, previously withdrawn

to the district court, would continue. This then raises the question whether the failure to object or appeal may be held to be vest the bankruptcy court with jurisdiction.

The situation presented here must be distinguished from those situations where a party files an adversary proceeding or a proof of claim. In such cases, courts accord preclusive effect to the bankruptcy decree. This court recently held that by filing a proof of claim, a creditor may subject himself to summary disposition by the bankruptcy court and waive the personal right to a trial by jury, citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). *Langenkamp v. Culp*, 498 U.S. ___, 112 L.Ed.2d 343, 347-48 (1990), *reh'g denied*, 498 U.S. ___, 112 L.Ed 2d 709 (1991). Where debtors submit their claim in the bankruptcy court, those claims become "integral to the restructuring of the debtor-creditor relationship." *Id.*

Here, CNA did not file a proof of claim, because it was not a creditor, nor did it file an adversary complaint or counterclaim in the bankruptcy court. Even if it had, the insurance dispute was withdrawn to the district court. Yet, the Seventh Circuit found that CNA failed to object or participate in the bankruptcy proceedings and therefore the confirmation order was binding. This decision is in accord with some circuits, which have held that parties may impliedly consent by failing to object to the bankruptcy court's jurisdiction, and are therefore bound by the bankruptcy order. *United States, Dept. of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1473 (4th Cir. 1990); *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137-38 (2d Cir. 1987); *In re Daniels-Head & Assoc.*, 819 F.2d 914, 917-18 (9th Cir. 1987); *In re Southern Indus. Banking Corp.*, 809 F.2d 329, 331 (6th Cir. 1987). In such cases, core and non-core proceedings are the functional equivalent, and a bankruptcy court has jurisdiction to enter final, binding orders. *Daniels-Head*, 819 F.2d at 918.

The Fifth Circuit reached an opposite result and held that the failure to object does not vest a bankruptcy court with jurisdiction. *Latham v. Wells Fargo Bank N.A.*, 896 F.2d 979 (5th Cir. 1990) (bankruptcy confirmation order was not binding despite lack of objection and opportunity to participate). One circuit refused to give preclusive effect on the basis that consent to bankruptcy court jurisdiction cannot be implied, but must be

expressly given under Bankruptcy Rule 7012(b). *In re Brickell Inv. Corp.*, 922 F.2d 696, 702 (11th Cir. 1991); *In re Davis*, 899 F.2d 1136, 1142 (11th Cir.), *cert. denied sub nom, Gower v. Farmers Home Admin.*, 498 U.S. ___, 112 L.Ed.2d 522 (1990).

Even those courts which have found consent to be implied have recognized that there are constitutional constraints. Courts cannot "lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III judge," because "to do so would violate the spirit of *Northern Pipeline.*" *Men's Sportswear*, 834 F.2d at 1137-38.

The parties' consent or waiver is not always dispositive of the question of jurisdiction. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850-51 (1986). The personal right to have an Article III court adjudicate a claim is subject to waiver by the parties. *Id.* at 848. However, Article III is integral to the "constitutional system of checks and balances" and prevents "the encroachment or aggrandizement of one branch at the expense of another." *Id.* at 850 (citations omitted).

> When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Id. at 851.

This Court should accept this petition to determine two issues which are raised. First, whether a party, which did not file a proof of claim or an adversary proceeding in the bankruptcy court, and did not consent to the jurisdiction of the bankruptcy court, can nevertheless be held to have impliedly consented to its jurisdiction or waived its rights to an adjudication by an Article III court and is bound to the estimated value of tort claims in a confirmation order by failing to object or appeal? Second, by giving a bankruptcy confirmation order binding effect when the district court had withdrawn the insurance action in which petitioner was a party, does this impermissibly encroach on the district court's Article III jurisdiction in violation of the Constitution?

C. Is a Bankruptcy Court a Court of Competent Jurisdiction for Preclusion and Estoppel Purposes?

Giving the bankruptcy confirmation order preclusive effect not only implicates Article III, but also the due process clause. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 7 (1979) (citations omitted). Before a judgment is conclusive, it must be rendered by a court of competent jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83, *reh'g denied*, 458 U.S. 1133 (1982).

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by *a court of competent jurisdiction* . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .

Montana v. United States, 440 U.S. 147, 153 (1979); (citations omitted; emphasis added).

In *Katchen v. Landy*, 382 U.S. 323, 334 (1966) this Court held that "the normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts." However, as pointed out in *Northern Pipeline*, the *Katchen* decision did not involve an Article III challenge, nor did it address the competency of a bankruptcy court to issue binding decisions. 458 U.S. at 79 n. 31.

The question presented here is whether the bankruptcy court was a court of "competent jurisdiction" where the district court withdrew the insurance dispute and the bankruptcy court lacked jurisdiction to liquidate the tort claims for distribution. If it lacked jurisdiction, then its orders have no effect. *Georgia v. South Carolina*, 497 U.S. ___, 111 L.Ed.2d 309, 327 (1990) (circuit court decision had no effect where only the Supreme Court had jurisdiction); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 865 (1985) (no estoppel effect unless court has in personam jurisdiction); *In re Marill Alarm Sys., Inc.*, 81 B.R. 119, 122-23 (S.D.

Fla. 1987), *aff'd without op.*, 861 F.2d 725 (5th Cir. 1988) (bankruptcy order "invalid because it was rendered outside its jurisdiction"). This Court should accept this petition to determine whether, under Article III, the due process clause and the Bankruptcy Code, the bankruptcy court was a court of competent jurisdiction for preclusion and estoppel purposes.

II. WAS ADEQUATE NOTICE GIVEN TO THE INSURER WHERE THE PLAN PROVIDED THAT THE NEWLY-ORGANIZED COMPANY WAS RESERVING THE RIGHT TO CONTINUE TO LITIGATE THE INSURANCE DISPUTE WITH ITS EXCESS INSURER AND TO RETAIN ANY PROCEEDS UNDER THE DUE PROCESS CLAUSE?

The due process clause is a constitutional limitation in bankruptcy cases. *Thomas*, 473 U.S. at 592-93, 602 n. 5. Even if a person has actual knowledge of a pending bankruptcy, he is not bound by any bankruptcy orders if notice which is calculated to inform him that his rights may be impaired is not given. *New York v. New York, N.H. & H. R.R. Co.*, 344 U.S. 293, 297 (1953); *In re Spring Valley Farms*, 863 F.2d 832, 834 (11th Cir. 1989) (collecting cases).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Although not a party nor a creditor, CNA had actual notice of the proposed reorganization plan agreed to by the debtor and creditor committees. That plan proposed the transfer of stock from the debtor to a trust which was to resolve all pending asbestos claims (App. 82a). The only reference to the insurance dispute was that, as a condition precedent to the confirmation of the plan, UNR reserved the right to litigate with and retain

any recovery from the insurers (App. 86-87a, 90-91a). A reorganization plan may provide for the retention and enforcement of any claim or interest. 28 U.S.C. §1123(a)(5) and (b)(3)(B).

The Seventh Circuit held that CNA had notice and an opportunity to participate in the bankruptcy proceedings (App. 6a). It concluded that the valuation of the tort claims was reasonable (App. 6a).[9] It held that the estimation of the value as found by the bankruptcy court in confirming the proposed plan was final, appealable and binding, and that the "parties may not re-litigate the matter" (App. 5a).

The circumstances in this case establish that since the reorganized corporation had reserved the right to litigate the insurance dispute, CNA had no reason to object to the proposed reorganization plan. The insurance dispute had been withdrawn to the district court, and CNA was not on notice that confirmation of the plan (in which the value of the tort claims was estimated) would be ultimately found to be conclusive on CNA. Under the Code, a bankruptcy court lacks jurisdiction to liquidate or estimate tort claims for distribution, and it cannot adjudicate such claims. 28 U.S.C. §157(b)(2)(B), (b)(2)(0), and (b)(5). Here, the district court repeatedly ruled that although the bankruptcy court could estimate the value of tort claims for purposes of reorganization, it could not adjudicate them under 28 U.S.C. §157. *In re UNR Indus., Inc.*, 45 B.R. 322, 325-27 (N.D. Ill. 1984); *In re UNR Indus. Inc.*, 74 B.R. 146, 148-49 (N.D. Ill. 1987).

Notwithstanding UNR's retention of the insurance cause of action, the Seventh Circuit held that the insurer was bound to the estimation of value of the tort claims made by the bankruptcy court in its confirmation order. The Fifth Circuit has also addressed this issue. In *In re Howe*, 913 F.2d 1138 (5th Cir. 1990), it held that even though the debtor generally reserved the right to litigate all other causes of action, this did not preclude the application of res judicata since the facts and circumstances were

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[9] The Seventh Circuit did not have a complete record of the bankruptcy proceedings before it and could not have been aware of the hearings on the proposed plan. The confirmation order was appealed to a different district court. *Unarco Bloomington Factory Workers v. UNR Indus., Inc.*, 124 B.R. 268 (N.D. Ill. 1990). The Seventh Circuit did have the proposed plan and the confirmation order in its record.

fully litigated in the prior bankruptcy when a proof of claim was contested. However, the Fifth Circuit acknowledged that its result could be different if the party had not been a major creditor in the bankruptcy court and the claim not specifically dealt with in the plan. 913 F.2d at 1147 n. 30. *In re Auto West, Inc.*, 43 B.R. 761, 764 (D.Utah 1984) holds that where the right to litigate an action is reserved in a reorganization plan "application of res judicata, estoppel or waiver" is improper. *C.f. Coral Gables First Nat'l Bank v. Constructors of Florida, Inc.*, 299 F.2d 736 (5th Cir. 1962) (where plan of reorganization provided that litigation with the debtor would continue in state court, the state court had jurisdiction to issue final judgments, not the bankruptcy court).

The Seventh Circuit's decision raises the constitutional question whether the notice given under these circumstances was adequate under the due process clause. Despite CNA's actual knowledge of the proposed reorganization plan, was CNA reasonably apprised that it would eventually be conclusively bound by the bankruptcy court's estimation of the value of all present and future tort claims in confirming a consensual plan?

III. WHETHER PRECLUSION PRINCIPLES APPLY TO AN ORDER CONFIRMING A REORGANIZATION PLAN IN WHICH THE PARTIES ESTIMATED THE VALUE OF TORT CLAIMS BY AGREEMENT?

While collateral estoppel precludes relitigation of an issue actually decided in prior litigation, it does not apply when the prior litigation was resolved by agreement of the parties. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327 n. 12 (1955); *United States v. Int'l Bldg Co.*, 345 U.S. 502, 506 (1953). *See also La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906-07 (7th Cir. 1990) (collecting cases). This is equally true in a class action, where there is a right to object. If the case is resolved by agreement, the court's approval is a consent decree, not binding on non-parties. *Local No. 93, Int'l Ass'n of Fire-fighters v. Cleveland*, 478 U.S. 501, 522, 528-29 (1986). *Accord Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989). To hold otherwise would contravene "the general rule that a person cannot be deprived of his legal rights in a proceeding

to which he is not a party." *Martin*, 490 U.S. at 759.

Settlements and compromises may be made in a plan of reorganization. *C.f. Protective Committee for Indep., Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, *reh'g denied*, 391 U.S. 909 (1968). Here, the formula by which the value of the tort claims was estimated was agreed upon by the debtor and the creditor committees (App. 85a). That estimated value was contained in the plan which was confirmed by the bankruptcy court.

There is a split in the circuits as to whether orders confirming reorganization plans are consent decrees where agreed to by creditors. The Fifth and Tenth Circuits have held that confirmation orders under such circumstances are consent decrees, to be construed under contract rules. *Paul v. Monts*, 906 F.2d 1468 (10th Cir. 1990); *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5th Cir. 1981) (plan adopted by majority of creditors). The Ninth Circuit has held that a reorganization plan accepted by 89% of the creditors was not a private contract through which the obligations of persons not party to the bankruptcy proceedings could be released. *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985).

Here, the Seventh Circuit held that it "did not matter" whether the bankruptcy order was a judgment or settlement (App. 4a). Under CNA's policy, however, the difference is crucial since, if it were a settlement which resulted in a consent decree, then CNA is only bound if it agreed and was a signatory to the settlement agreement (*supra*, p. 4 n. 3). CNA's written consent to settlement by the insured is a condition precedent to any action by the insured based on the policy (Doc. 2050 (UNR SJ Mot.) Exh. 1 p. 5 ¶7).

The second issue which arises in this regard is whether there was a finding of fact actually and necessarily determined by the bankruptcy court, a prerequisite to preclusion principles. *Brown v. Felsen*, 442 U.S. 127, 139 n. 10 (1979). Here, the bankruptcy court confirmed the plan of reorganization, in which the value of the tort claims was estimated by using a formula negotiated and agreed upon by the debtor and creditor committees, parties in the bankruptcy proceeding (App. 83-85a). The

Seventh Circuit held that CNA was bound to that estimated value, but it adjusted it upwards to a "real value" by using the negotiated formula (App. 6a).

The question then arises whether there was any "fact" found in the confirmation order where the value was only estimated by agreement? Under the Bankruptcy Code, tort claims must be estimated in order to determine whether reorganization is feasible. *A.H. Robins*, 788 F.2d at 1012. The bankruptcy court lacks the authority to liquidate such claims; only a district court can adjudicate the tort claims. *Id.; UNR*, 45 B.R. at 326; 28 U.S.C. §157(b)(2)(B), (b)(2)(O), and (b)(5). However, the value of such claims may be estimated, and reorganization confirmed, before the tort claims are liquidated in the district court. *A.H. Robins*, 788 F.2d at 1012; *In re White Motor Credit*, 761 F.2d 270, 274 (6th Cir. 1985); *UNR*, 45 B.R. at 326.

This Court should accept this petition to determine whether preclusion principles apply where the former adjudication was resolved by consent of the parties. One issue is whether a confirmation order accepted by creditors is a consent decree, not binding on non-parties? The second is whether a non-party is bound by a finding of "fact" where that "fact" was the estimation of the value of tort claims, reached by a negotiated, agreed upon formula.

IV. WHETHER THERE IS A CASE OR CONTROVERSY WHERE NO COVERED CLAIM HAS BEEN IDENTIFIED AS REQUIRED BY STATE LAW?

A federal court is constitutionally constrained by Article III to resolve cases and controversies, which must be present at all stages of the litigation. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990). Before a federal court may adjudicate a declaratory judgment action, there must be "concrete legal issues, presented in actual cases, not abstractions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The test is whether, under all the circumstances, "there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Id.*

The district court here held that there was no present controversy for it to resolve. Illinois law requires a case-by- case showing of whether a claimant's claim falls within CNA's policy period. *Zurich*, 118 Ill.2d at 47-48, 545 N.E.2d at 161. Here, no such showing has been made by UNR.[10] Because the district court found no present liability, it never addressed the question of how the claims should be valued.

On appeal, valuation of the tort claims was not an issue nor briefed. The Seventh Circuit affirmed the district court's interpretation of *Zurich* in its entirety (App. 9a n. 2) and elsewhere held that the holding that Illinois law required identification of claims on a case-by-case basis "may be right" (App. 10a). It then discussed how the claims should be valued and, by applying the formula negotiated by others, increased the estimated value of all tort claims, to find the "real value." This holding is akin to bifurcating trial and having the jury consider damages before liability.

If the reorganization plan is not binding on CNA, there still has been no binding judgment or settlement and this claim for indemnification is premature. Until any claim is tendered to CNA, and refused, there is no further controversy for a court to resolve. The Seventh Circuit held that it is "common" in insurance disputes to seek a declaration of the obligation to indemnify, citing *ACandS, Inc. v. Aetna Casualty & Sur. Co.*, 666 F.2d 819, 822-23 (3d Cir. 1981) (App.3a n.1). On the contrary, the question of whether an insurer must indemnify before there has been a judgment or settlement is one on which the circuits are divided.[11]

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[10] It has been CNA's position for the last decade that if UNR tendered a covered claim which fell within CNA's policy period after exhaustion of the primary limits, CNA would indemnify UNR. In 1980, a UNR memo recorded CNA's willingness to "step in when Continental's primary insurance was exhausted" (Doc. 2048 (CNA Stmt) p.2). CNA has repeated its position throughout this litigation (*see, e.g.*, Doc. 1891 (CNA Resp.) p.3; Sup.Rec.Vol. 23 #81 p. 1 and #82 p. 8; Doc. 1889 (CNA Reply) p. 11; Doc. 2058 (CNA Reply) pp. 13-14).

[11] The duty to indemnify and duty to defend are distinct obligations. It is common to seek a declaration of an insurer's obligation to defend, not to indemnify, before judgment or settlment. *U.S.F.&G. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 73, 578 N.E.2d 926, 930 (1991); *Zurich*, 118 Ill.2d at 52, 514 N.E.2d at 163.

The Second, Fourth, Fifth, Eighth and Eleventh Circuits have held that there is no case or controversy until there has been an adjudication of the insured's liability. *Greenwich Marine, Inc. v. S.S. Alexandra*, 339 F.2d 901 (2d Cir. 1965); *A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp.*, 559 F.2d 928 (4th Cir. 1977) (recognizing conflict between the Second and Third Circuits); *American Fidelity & Casualty Co. v. Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co.*, 280 F.2d 453, 461 (5th Cir. 1960); *Century Indemnity Co. v. McGillacuty's, Inc.*, 820 F.2d 269 (8th Cir. 1987); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385 (11th Cir. 1982). "It is not the function of a United States District Court to sit in judgment on . . . nice and intriguing questions which today may readily be imagined, but may never in fact come to pass." *American Fidelity*, 280 F.2d at 461. *See also UNR Indus., Inc. v. American Mut. Liability Ins. Co.*, 92 B.R. 319 (N.D.Ill. 1988); *Forty-Eight Insulations, Inc. v. Johns-Manville Prod. Corp.*, 472 F.Supp. 385 (N.D.Ill 1979). The Seventh Circuit has also held that such an action is premature. *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165 (7th Cir.), *cert. denied*, 395 U.S. 959 (1969).

The Third Circuit, like the Seventh Circuit in this case, has held that it may resolve whether an insurer owes a duty to indemnify even though there has been no settlement or judgment entered against the insured. *ACandS, Inc. v. Aetna Casualty & Sur. Co.*, 666 F.2d 819, 822-23 (3d Cir. 1981). *C.f. Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673, 674-75 (3d Cir. 1964), *cert. denied*, 382 U.S. 812 (1965).

Century Indemnity, like this case, involves an excess policy. The Eighth Circuit held that a cause of action against an excess insurer is premature and presents no case or controversy until it is established that the liability faced by the insured would reach beyond the primary limits into the excess limits, in conflict with the Seventh Circuit's opinion here. *Century Indemnity*, 820 F.2d at 270.

The Seventh Circuit recognized that before CNA's insuring obligations were triggered, an allocation of claims had to be made to determine whether there were claims which fell within CNA's policy period (App. 11a). It also recognized that the district court would have to determine whether the value of those claims

exceeded the underlying insurance. Finally, it acknowledged that CNA as excess insurer was only liable for the amount which exceeded the primary insurance subject to the yearly policy limits of the CNA policy.

The Seventh Circuit then did an extended analysis of the value of those possible claims. It ignored the fact that unless and until even a single claim is identified as falling within CNA's policy period, there is no need to value them. CNA moved for summary judgment on the basis that *not a single person alleged to have been injured by UNR asbestos had ever been identified by UNR as a person whose claim was covered by CNA's policy.* At this juncture, until UNR identifies such a claim, there is no controversy over the value of any claim. "[R]ipeness is peculiarly a question of timing. [I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas*, 473 U.S. at 580 (citations omitted). If a claim is premised on "contingent future events that may not occur as anticipated," it is premature. *Id.* at 580-81.

The district court correctly concluded that there was no present basis for further declaratory relief. There can be no case or controversy against CNA until UNR tenders claims for indemnification which are covered claims under the policy and which are refused. *Compare Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, *reh'g denied*, 300 U.S. 687 (1937). It is not surprising that UNR to date has failed to proffer even a single name. CNA did not insure UNR when it was making asbestos products, thus there was no "exposure" during its policy period which would trigger its insuring obligation under *Zurich*. UNR has never shown that the second trigger (that the claimant manifested sickness or disease during CNA's policy period) was met either. CNA insured UNR before most asbestos victims became ill — only about 100 suits were filed during CNA's policy period and in the two years thereafter, when most statutes of limitations would run. These claims no doubt were settled long before the bankruptcy, and either before or during the Houston Agreements. The Seventh Circuit's analysis of the "real value" of claims is premature since, until a claim is identified, there is no need to value it.

This Court should accept this case for review to resolve the conflict in the circuit courts and determine whether there is a present controversy to be resolved.

CONCLUSION

Petitioner Continental Casualty Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled proceedings on August 29, 1991, and the denial of the petition for rehearing on October 3, 1991.

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